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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 229

STANLEY TAYLOR, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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No.

STANLEY TAYLOR, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Stanley Taylor, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on April 26, 1944.

The petitioner files herewith as an exhibit hereto a duly certified transcript and supplemental transcript of the record in the case as the same appears in the United States Circuit Court of Appeals.

Opinion and Proceedings Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 225, Garrecht and Healy,

Circuit Judges, and McCormick, District Judge) is not yet reported. Subsequent to such opinion, a motion to dismiss the proceedings and to discharge the petitioner on ground of lack of jurisdiction of the subject matter was made and denied on June 12, 1944 (Supp. R.....).

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered April 26, 1944 (R. 250). Petition for rehearing was entertained, and was, on June 2, 1944, denied (R. 251). The statutory provision believed to sustain the jurisdiction of this Court is § 250(a) of the Judicial Code as amended. See also Rule XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether petitioner may be deprived of the right to defend on the ground that the Regulation is unconstitutional on its face when petitioner has not forfeited this right by failure to make timely assertion of the right before the tribunal having jurisdiction to determine it.[1]

2. Whether petitioner may be deprived of the defense that the Regulation is invalid by forcing him to trial and convicting him of a violation of such Regulation in a Court which is deprived of the right to consider such validity, while said petitioner is diligently seeking determination of the validity of such Regulation by the statutory procedure.[1]

3. Whether the petitioner has been denied due process of law when he was compelled to proceed to the conclusion of his criminal trial after introducing evidence that

[1] This question was expressly reserved by the United States Supreme Court in the case of *Yakus v. United States*, 64 S. Ct. 660, at 678, 88 L. Ed. 653, at 672, and as yet has not been determined.

he had duly challenged the validity of the Rent Regulation pursuant to the provisions of §§ 203 and 204 of the Emergency Price Control Act of 1942 which proceedings were then pending in the United States Emergency Court of Appeals and undetermined and that by reason thereof he had had no opportunity to establish the invalidity of the Regulation by resort to the statutory procedure.[1]

4. Whether the petitioner is guilty of wilful violation of §§ 4(a) and 205(b) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress) by demanding or receiving the rents provided by § 1388.1804(d)(3) or (4) instead of those provided by § 1388.1804(a) of Maximum Rent Regulation No. 28.

5. Whether § 1388.1804 of Maximum Rent Regulation No. 28 is sufficiently certain to inform petitioner whether it is § 1388.1804(d)(3) or (4), or, instead, § 1388.1804(a) of Maximum Rent Regulation No. 28 which designates the maximum rents applicable to the housing accommodations in petitioner's apartment house.

6. Whether the petitioner has been denied due process of law where he relied upon the provisions of the Emergency Price Control Act of 1942 and of Maximum Rent Regulation No. 28 issued pursuant thereto in applying the maximum rents provided thereby to his property, but the trial Court failed to certify such fact to the Administrator pursuant to § 205(d) of such Act.

7. Whether petitioner has been deprived of due process of law in the proceedings herein.

Statutes Involved.

The provisions of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress) and of Maximum Rent Regulation No. 28 issued pursuant thereto, together with Interpretations of the Administrator of the Office of

Price Administration involved in this case, are set fort
in Part I of the Appendix hereof.

Statement.

An Information was filed in the District Court of th
United States for the Northern District of Californi
Southern Division, charging the petitioner with twent
violations of Sections 4(a) and 205(b) of the Emergenc
Price Control Act of 1942 (Public Law 421, 77th Co
gress); he was convicted on sixteen counts;[2] the judg
ment was affirmed by the Court below (R. 250). The pet
tioner, a layman who operated a machine shop in Sa
Francisco, was not represented by counsel at his tri
(Deft's. Exhibit 2-B, admitted in evidence R. 99; App. i
R. 208, 209). In August, 1941, he purchased an apartmen
house located and known as 530 Larkin Street, San Fra
cisco, which he and his wife have since owned as joi
tenants (R. 43). Previous to its purchase by the pet
tioner the property had been in the hands of a truste
in bankruptcy for a considerable time (R. 148). Th
building contained forty-eight apartments, seventeen
which were vacant at the time it was acquired by pet
tioner (R. 148). Of the thirty-one occupied apartment
many were occupied by transients, some of whom were
questionable character (R. 148). The rentals in many i
stances had no relation to the value of the apartments an
all were abnormally low (R. 148). There were furnishe
apartments in the building for which the rental was onl
thirty (30) dollars per month, while the rent f
comparable unfurnished apartments in the building wa
thirty-five (35) dollars per month (R. 85 and 148).

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2 The information contained a total of twenty-one counts. Petitioner w
acquitted on the twenty-first count which alleged he had unlawfully and w
fully attempted to evict a certain tenant in violation of Maximum Re
Regulation No. 28, § 1388.1806 and § 4(b) of the Act. The remaining cou
were dismissed (R. 210).

Petitioner realized at the time he purchased the property that it was not a paying business, but acquired it believing that proper management would make it profitable (R. 148-149). A great deal of rehabilitation of the building was necessary and new management was installed (R. 149). Intending to ultimately dispose of individual apartments in the apartment house on a community apartment house basis by which each occupant would own his own apartment (R. 149), the petitioner put the property on a utility budget of $200 per month and gave his tenants written notice on November 29, 1941, that they must pay their proportionate shares of any "excess utility charges" (R. 52, 53, 149-150). The petitioner borrowed $5000 additional on the property in January, 1942, to defray the cost of its rehabilitation and gradual rehabilitation of the building was begun (R. 150). On March 1, 1942, the rents for the various apartments in the property were at least 25 per cent lower than normal for such apartments in San Francisco (R. 150).

Because the rental for many of the furnished apartments was less than the rent for the same kind and size of apartments unfurnished, petitioner decided to sell the furniture and rent the apartments unfurnished (R. 96 and 113). Mrs. Evelyn Flynn, who had been employed as manager of the apartment house, objected to the possible resulting removal of the tenants and stated that if she had money she would buy the furniture rather than see it removed (R. 96). Petitioner replied that if she wanted to be bothered with the furniture, lack of cash with which to purchase it would not prevent her from acquiring it (R. 97). The petitioner and Mrs. Flynn then executed an installment sales contract, dated June 6, 1942, by which Mrs. Flynn purchased all of the furniture in petitioner's building (R. 86-90) for $15,000 (R. 96). This was all consummated before San Francisco became

subject to any rent regulation. Written notice of the sal of such furniture was then given to each tenant (R. 64) Petitioner reduced the rental to a "basic rental" fo each unfurnished apartment and made separate charge on the basis of actual cost for utilities, cleaning, mainte nance, etc., which charges would be paid by the occu pants after conversion of the property into a commu nity apartment house (R. 149, 150-151 and 176). In eac instance such "basic rental" was materially less tha the March 1, 1942, rental for such apartment furnishe (Govt's. Exhibit 1, columns headed by months of "July to "November", inclusive, R. 46, admitted in evidenc at R. 45).[3] Mrs. Flynn arranged with the respective ten ants for the amount she would charge for the furnitur used by each tenant (Deft's. Exhibit B which is on th reverse of Defts'. Exhibit D, R. 50, 55, 56, 58, 60, 6 65, 66, 67, 68, 70 and 78). This amount, when added t the rent charged by petitioner for the unfurnished apart ments and to the utility and other charges, exceeded th rentals for such apartments when rented furnished o March 1, 1942, by $2 to $15 per month (R. 45, 46).[4]

The total of all charges for the apartments and fur niture, including charges for utilities, etc., was substan tially the same as the normal rents for such apartment in the neighborhood and in the City of San Francisc as set forth in Government's Exhibit No. 1 under th column entitled "Fair Rent Established by Tenants' Sur

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[3] The rents shown for the respective apartments in Government Exhib No. 1 (R. 46, 45) for the months of July and November, both inclusiv are the only amounts received by petitioner as and for rent for the r spective apartments (R. 176). All other amounts added into the "Nov. I Total all Charges" shown in the column at the extreme right of the exhib were the charges, based on cost, for utilities, etc., to which were added th charges made by Mrs. Flynn for the use of her furniture (R. 46, 176).

[4] The "Fair Rent Survey" establishes the rent for Apartment 410 at $50.0 per month while the total amount actually collected by the appellant an Evelyn Flynn was $42.50 per month and not $96.50 as might be inferre from Govt's. Ex. 1 (R. 46). This apartment is the subject of Count 15 o the Information which charges petitioner with having collected a rental o $10.00 per week instead of the March 1, 1942 rental of $40.00 per month fo such apartment (R. 30, 164).

vey May & June" (R. 46). This survey was taken prior to the installation of the automatic laundry equipment and prior to the complete rehabilitation of many of the apartments (Deft's. Exhibit 2-B, App. x, admitted in evidence R. 99).

Mr. Dunlap, attorney for the Office of Price Administration, told petitioner on July 24, 1942, that the sale of the furniture did not change the apartments from fully furnished to unfurnished, but the improvements made to the building were not mentioned (R. 45, 102-103). A supplemental agreement was then executed July 31, 1942, by petitioner and Evelyn Flynn providing that if such a construction by the Office of Price Administration should prevent Mrs. Flynn from paying for the furniture, that she could return the furniture to the petitioner, as vendor, without any liability for the unpaid balance of the purchase price (R. 90-93).

Between March 1, 1942, and July 1, 1942, a laundry room and an automatic laundry, including the installation of pipes and a drain at a total cost of $500, were provided and installed in the building for the use of all tenants (R. 94, Deft's. Exhibit 2-B, App. Pt. II, pp. ix, x). No laundry accommodations had been provided for tenants in this building on March 1, 1942 (R. 98).[5] The evidence is undisputed that the installation of the laundry equipment was an added feature and saved some of the ten-

[5] The City of San Francisco, in which the property is located, was not subject to rent control until Maximum Rent Regulation No. 28 was issued by the Administrator of the Office of Price Administration on June 30, 1942, to become effective on July 1, 1942 (R. 3). Section 1388.1804(d) of Maximum Rent Regulation No. 28 provides as the maximum rents for "(3) housing accommodations changed between those dates (March 1, 1942, and July 1, 1942) from unfurnished to fully furnished or from fully furnished to unfurnished or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance the first rent for such accommodations after such construction or change, Provided, however, that where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in Section 1388.1805(c)."

ants as much as $5 a month on their laundry (R. 98), and that there had been considerable painting and fixing up in the apartments and that on occasion there were as many as three men employed for the purpose of painting, papering and general repairing (R. 85, 98, 150).

Apartments 101, 108, 209, 310, 406, 502, 508 and 510 which are, respectively, the subjects of Counts 1, 3, 7, 10, 12 17, 19 and 20 on each of which petitioner was convicted were each completely rehabilitated between March 1, 1942 and July 1, 1942 (Government's Exhibit No. 1, R. 46, admitted at R. 45).[6]

The petitioner filed a protest under Section 203 of the Emergency Price Control Act in the Office of Price Administration on August 27, 1942 (R. 115, 116, Deft's. Exhibit 2-I), which was denied October 1, 1942 (R. 119, 120). Pursuant to Section 204 of the Act, petitioner then filed a complaint with the United States Emergency Court of Appeals on October 23, 1942, which was admitted in evidence (R. 122, Deft's. Exhibit 2-O, R. 123-147). In these proceedings the petitioner challenged the validity of Maximum Rent Regulation No. 28 and of Procedural Regulation No. 3. Petitioner's complaint so filed by him in the United States Emergency Court of Appeals in which he requested a hearing and permission to submit evidence by

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[6] A "major capital improvement" by reason of "complete rehabilitation" was not claimed for Apartment 203 to which the Court below refers in its opinion (R. 236) nor was such claim made on behalf of any of the apartments except those enumerated above and designated by the letter "C" under the column entitled "Complete Rehabilitation" on Govt's. Ex. 1 (R. 46). However, all of such remaining apartments, except Apartment 410, received at least some items of additional furniture since March 1, 1942, while the laundry room and its equipment installed between the dates of March 1, 1942, and July 1, 1942, benefited and served as an improvement to each apartment in the building (R. 46, 94). There were only fifteen out of the forty-eight apartments which did not receive some additional furnishings after March 1, 1942 (R. 179).

affidavit or testimony of witnesses, was pending and undecided at the time of his criminal trial (R. 122, 147).[7]

Petitioner was precluded at the trial from showing the unconstitutional taking of his property without just compensation therefor and without due process of law upon which he maintained that the Regulation was invalid (R. 122, 178).

Confronted with threats of continuous litigation (R. 161, 164) and denied any administrative ruling or interview by the Office of Price Administration (R. 164, 165), the petitioner sought to discontinue renting the apartments under § 4(d) of the Act, but was restrained by the District Court from doing so in contempt proceedings brought against him by the Administrator (R. 161-162, 169-170).

On December 11, 1942, one week after petitioner's attempt to withdraw the apartment house from the rental market, the Information was filed in the District Court.

No order or notice establishing the maximum rent for the apartments or the rent for the furniture, nor any warning notice from the Office of Price Administration had been given either to the petitioner or Evelyn Flynn notifying them that the first rents charged after making such improvements were not the proper maximum rents (R. 95, 180). The first notice to petitioner that his rents were considered improper was the service on him of a preliminary restraining order which was after the alleged violations had occurred (R. 159-160, 162).

During the trial one of the jurors was reported absent, whereupon the trial Court stated that such juror was

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[7] The Emergency Court of Appeals rendered its decision on petitioner's complaint on July 15, 1943, *Taylor v. Brown*, 137 F. 2d 654, cert. den. Nov. 15, 1943, 64 S. Ct. 194. In rendering its decision in that case the Court stated at the end of the first paragraph: "We are thus called upon to consider the constitutional validity of the Act and Regulation *generally and without regard to their particular application to the complainant.*" (Italics added.)

unavoidably detained and, without any explanation, asked petitioner whether the case might be tried by eleven jurors to which the petitioner, who was not represented by counsel, answered, "Yes, your Honor" (R. 95).

Although the petitioner's defense was that he had complied with the provisions of Maximum Rent Regulation No. 28 and of the Act in establishing rents for his apartments (R. 113, 152, 157-158, 177-178), the trial Court failed to certify such fact to the Administrator of the Office of Price Administration as required by the last sentence of § 205(d) of the Emergency Price Control Act of 1942.

The jury recommended leniency on all counts on which they found the petitioner guilty (R. 208).

Specification of Errors to be Urged.

The Court below erred, as follows:

1. In sustaining the judgment of conviction.

2. In making an *ex post facto* application of §1388.1809 of Maximum Rent Regulation No. 28 to petitioner.

3. By invading the province of the jury in resting its decision upon its own finding of fact adverse to the petitioner upon the very question of fact specifically and erroneously withheld from the jury by the trial Court.

4. In arriving at its decision upon issues not available to it in view of the issues framed by the trial Court, and the exclusion of evidence and instructions to the jury.

5. In holding that a layman, not represented by counsel, may waive his constitutional right to a jury of twelve members where such defendant had not been informed by the court or the government that he had such constitutional right.

6. In sustaining the trial Court's error in disclosing to the jury its opinion that petitioner was guilty as charged.

7. In sustaining the trial Court's refusal to instruct the jury concerning the provisions of §1388.1805(d) of the Regulation and of §§ 205(e) and 205(f)(2) of the Act as requested by the petitioner.

8. In sustaining the trial Court's error in failing to instruct the jury concerning the petitioner's defense of good faith under §205(d) of the Act.

9. In determining contrary to the Official Office of Price Administration's Interpretation 5(a)(1)-I that improvements made by petitioner did not constitute Major Capital Improvements.

10. In sustaining the judgment of conviction by holding that there had been no change in petitioner's apartments from fully furnished to unfurnished and in holding there had been no major capital improvements made thereto, contrary to the undisputed evidence of Government's Exhibit No. 1 (R. 46) and contrary to the trial Court's ruling thereon which precluded petitioner from submitting detailed evidence thereof (R. 94).

11. In sustaining the trial Court's admission of irrelevant and immaterial evidence, over the objection of the petitioner, showing that major capital improvements had not been made after July 1, 1942, the admission of which could only confuse the jury.

12. In failing to strictly construe the provisions of the Act, Regulation and Official Interpretations thereof and in failing to adopt that interpretation thereof which is most favorable to the accused where more than one reasonable interpretation of such provisions is possible.

13. In failing to grant the motion to dismiss the criminal proceedings and to discharge the appellant for lack of jurisdiction thereof by reason of the fact that such court was deprived by §204(d) of the Act of jurisdiction to consider questions of law determinative of the case

which questions had been properly raised by petitioner but had never been determined or passed upon by a Court of competent jurisdiction.

14. In failing to reverse the judgment of the district court for its error in denying the defendant's motion to quash the Information.

Reasons Relied on for Granting the Writ.

1. The Circuit Court of Appeals has decided the following important questions of federal law which have not been, but should be, settled by this court:

(a) The Court has deprived petitioner of the defense that the Regulation which he was accused of violating is unconstitutional on its face (R. 248).

(b) The Court has also deprived petitioner of the defense that the Regulation under which he was charged was invalid as applied to petitioner in the circumstances of this case, notwithstanding that petitioner was forced to trial and convicted of violating such Regulation while he was then diligently seeking determination of its validity by the statutory procedure provided in the enabling Act (R. 248).

Each of these questions arising under §204(d) of the Emergency Price Control Act of 1942 was specifically reserved by this Honorable Court in the case of *Yakus v. United States,* 64 S. Ct. 660 at 678, 88 L. Ed. 653 at 672.

2. The Court below has decided the federal questions presented as (a) and (b) above in a way probably in conflict with applicable decisions of this Honorable Court, for although this Court reserved these questions in *Yakus v. United States,* supra, this Court held in the same paragraph of its opinion in which these questions were reserved:[8]

[8] 64 S. Ct. at page 678, 88 L. Ed. at page 672.

"Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds."

3. The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the lower Court, as to call for an exercise of this Honorable Court's power of supervision as to the following matters:

Petitioner is not guilty. The facts are set out in the Statement, ante.

(a) The capital improvements made by petitioner are admitted, and that they comply with the Official Interpretation 5(a)(1)-1 defining Major Capital Improvements has not been denied. However, the trial Court submitted the question as to whether there had been any such improvements to the jury, and the Circuit Court, in order to sustain the conviction, has introduced into the determination of this question, considerations involving the purposes of the Act, the number of the apartments, the amount the rent was raised and the alleged temporary use of the facilities —not one of which considerations is set forth in the Interpretation defining major capital improvements upon which the public is required to rely (R. 236-238).

(b) Regardless of any consideration of the major capital improvements, the petitioner is not guilty as charged by the Information unless the amounts charged by a third party, Evelyn Flynn, for the rental of her furniture is imputed to the petitioner and added to the amounts collected on his behalf for the rental of the unfurnished apartments (R. 46, 180).

The lower court accepted in evidence Government's Exhibit No. 1 which establishes a complete defense for petitioner on every count, by reason of the Major Capital Improvements and changes from furnished to **unfurnished** there evidenced, and by reason of the further fact that the exhibit clearly shows that the amounts charged and received by petitioner as and for rent of the apartments in question in each instance were lower than the rents charged on March 1, 1942. The column entitled "November 1st Total all Charges" shown at the extreme right of this exhibit does not represent the rents which petitioner demanded and received from his tenants as and for rent, but includes charges made by Evelyn Flynn for the use of her furniture and charges for utilities and services including the use of laundry equipment which were not provided on March 1, 1942.[9]

When petitioner offered to prove each item of information contained in Government's Exhibit No. 1 (R. 46) the Court stated that the exhibit was in evidence showing changes made in the various apartments, major improvements, whether unfurnished and whether there had been complete rehabilitation and that the exhibit would be given to the jury and ruled that it was not necessary for the witness to testify to each item (R. 94).

The Circuit Court of Appeals used the Government's Exhibit No. 1 only for comparison of the March 1, 1942, rents with the "Nov. 1st Total (of) all Charges", but ignored Exhibit No. 1 as to the "Major Capital Improvements" and the "Nov. (1)" rents for the unfurnished apartments shown thereon. Such use of this exhibit is

[9] Insofar as petitioner received any sums of money paid by the tenants to Mrs. Flynn for the use of her furniture, he received the same as payments on account of the purchase price of said furniture and not as rent (R. 97, 180).

inconsistent with the ruling of the trial Court precluding other evidence of changes and major capital improvements (R. 94).

The trial Court later removed from the case the question of whether there had been a change of the apartments from furnished to unfurnished by instructing the jury to "disregard evidence relating to said change of ownership" (R. 190), but did not question either the validity of the sale of the furniture or the change of ownership thereof. It is difficult, therefore, to understand how petitioner may be held criminally responsible for charges made by Evelyn Flynn for the use or rental of her furniture.

The Circuit Court of Appeals in its opinion seeks to cure this obvious defect by holding,

> "that the transaction between defendant and Mrs. Flynn reflected by the two instruments of agreement . . . is more in the nature of a contrivance to circumvent the operation of the Emergency Price Control Act in the Larkin Street apartment house than of a forthright sale of the furniture and furnishings in such property."

This question having been withheld from the jury, the Circuit Court of Appeals may not invade the province of the jury by substituting its own finding of fact to a question or defense so withheld from the jury.

> *Hodges v. Easton*, 1 S. Ct. 307, 106 U. S. 408, 27 L. Ed. 169.

> "It was the duty of the court to submit to the consideration of the jury the testimony adduced by the defendant to sustain the defenses set up in his answer, and the charge should be based on the hypothesis that the defenses which the testimony tended to prove were proven."
>
> *Ranney v. Barlow*, 5 S. Ct. 104, 112 U. S. 207, 28 L. Ed. 662.

"Questions of fact should be submitted to the jury and it is not proper for the court to wrest one part of a case, more than any other, from the exercise of their judgment."

Hickman v. Jones, 76 U. S. 197, 9 Wall. 197, 19 L. Ed. 551.

"Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of a jury."

Jacob v. New York City, 315 U. S. 752, 756, 86 L. Ed. 1166, at 1170.

The lower Court lacked jurisdiction to question the contract of sale of the furniture. *United States v. Union Pacific Railroad Company*, 98 U. S. 569, 25 L. Ed. 143.

(c) The Circuit Court of Appeals has departed from the established rule of construction that where two or more reasonable interpretations of a statute or regulation are possible the one most favorable to the accused in a criminal trial must be adopted. This was done in its consideration of the Major Capital Improvement, § 1388.1805(d) of the Regulation, and § 205(f)(2) of the Act.

The improvement made fits with exactitude every test of Official Interpretation 5(a)(1)-1 promulgated by the Office of Price Administration for the determination of this question.[10]

The lower Court held that § 1388.1805(d) of the Regulation has no relevancy to this case (R. 239). This is entirely opposed and contrary to Official OPA Interpretation 4(d)-1[11] entitled—"Procedure Where

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10 Under the division of structural addition in Interpretation 5(a)(1)-1 the following language is used:

"The addition need not necessarily be a part of the structure, but might also include a new garage or the installation of sidewalks. If the improvement has resulted in some added feature which did not exist prior to the change of a kind which would normally result in an increase in the rental value, then it would be a substantial change by a major capital improvement."

11 4(d) of the Housing Regulation which is referred to in this Interpretation is § 1388.1804(d) of Maximum Rent Regulation No. 28.

There Is Doubt as to Whether a Major Capital Improvement Has Occurred", which provides in part as follows:

"Where the question whether there has been a major capital improvement is a close one, the landlord may not wish to take the risks involved in making his own determination of the question. In such a situation there is, within the meaning of Section 5(d),[12] doubt concerning a 'fact necessary to the determination of the maximum rent'. The Rent Director on his own initiative may determine this fact for purposes of establishing the maximum rent."

Section 1388.1805(d) of the Regulation reads:

"If the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Administrator on petition of the landlord filed within 30 days after the effective date of regulation, or at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact; or if the Administrator is unable to ascertain such fact he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date."

Thus it will be seen that petitioner had only thirty days in which to file a petition seeking a determination of whether his improvements constituted "major capital improvements" while the Administrator may make such determination on his own initiative at any time. Having no doubt that his improvements were major capital improvements within the meaning of § 1388.1804(d)(4) of the Regulation as defined in the Office of Price Administration Official Interpretation 5(a)(1)-1, the petitioner was not expected to file such a petition within the thirty days allowed for the purpose and did not do so. On the other hand, the Administrator has not made any determination on his own

[12] § 5 (d) of the Housing Regulation is designated as § 1388.1805 (d) of Maximum Rent Regulation No. 28.

initiative as to whether or not the improvements made
the petitioner on his property were major capital impro
ments. It would have been the duty of the Administra
to determine this if there was any doubt in his mind c
cerning the matter.

In construing § 205(f)(2) of the Act as applying only
licenses, the Court has overlooked the alternative provisi
thereof which reads "*or* has violated any of the provisi
of any regulation, order, or requirement under sectio
or section 202(b) . . . which is applicable to such pers
a warning notice shall be sent by registered mail to s
person". This alternative provision is separate and
tinct from the first alternative which is the one applica
in the case of licenses as provided in subdivision (f)(1)
the section.

Unless this second alternative clause does require
warning notice to persons who have violated "any of
provisions of any regulation . . . under section 2 or
tion 202(b) of the Act" it is obvious that no meaning
given to this provision enacted by Congress because
first alternative phrase alone fully covers all violations
licenses. To ignore the alternative provision referred t
a refusal to give any effect or meaning to this provis
of the Act, contrary to the fundamental rules of statut
construction.

4. Although the precise question has not as yet b
decided by other Circuit Courts, certiorari should
granted because the decision concerning the major cap
improvements is in conflict with a decision of the Un
States District Court for the District of Utah (Febru
15, 1943, reported in P. & F. O. P. A. Service 622:7
C.C.H. 51,778 at 51,780) in which such District Court
(at page 622:75) that the installation of a new drain
necting with the sewer, establishing a handrail on the
stairs, and the installation of an automatic gas heater,
properly classified as major capital improvements
cause they are in excess of what might be called

repairs", and refused to grant an injunction as prayed by the Administrator on two counts which concerned the housing accommodations in which such major capital improvements had been made.

5. The decision of the Circuit Court of Appeals as to the vagueness and lack of certainty of § 1388.1804 of Maximum Rent Regulation No. 28 to inform a person of common intelligence who had made improvements to his rental property just which maximum rent therein was properly applicable, by holding that any doubts respecting rents which should have been charged were "effectually answered by the regulations" (R. 240), is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

Such penal statutes have been held by this Court to violate the due process clause of the United States Constitution in the cases of *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. Ed. 324; *Lanzetta v. State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888, and *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

It was not only reasonable but it was more logical under the circumstances of the instant case for the petitioner to apply to the property the rentals provided under subdivision (d)(4) of § 1388.1804 instead of those provided by subdivision (a) thereof.

As stated in the case of *Connally v. General Construction Co.*, supra:

> ". . . The dividing line between what is lawful and unlawful can not be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a puishment

for their violation, should not admit of such double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

6. The decision of the Circuit Court of Appeals as to the waiver by a defendant who is not represented by counsel in a criminal trial of the absence of a juror when not informed by the trial Court or the government either that he need not make such waiver or that his refusal to do so would result in the eventuality of a mistrial by holding that his assent to continuing the trial with only eleven jurors under such circumstances was a free and intelligent waiver is a decision of a federal question in a way probably in conflict with the applicable decisions of this Court.

This Court has given the test by which a defendant may consent to a waiver of a jury of twelve members in the case of *Patton v. U. S.*, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253. The opening paragraph of the opinion in that case shows that the defendant was represented by counsel and that the trial Court had first explained that the defendants need not waive the absence of a juror, and that a mistrial would result in the absence of such waiver. The facts as shown in the report of *Patton v. U. S.*, 30 F. 2d 1015, 1016 shows that the waiver of a juror was initiated by the defendant's counsel. In the instant case the waiver was initiated by the trial Court with no explanation whatever that the defendant need not waive such absence of a juror or of the eventuality of a mistrial if the defendant, who was not represented by counsel, declined to assent to such waiver.[13]

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13 The complete record of the proceedings concerning the waiver of juror by the petitioner is as follows (R. 95):

"The Clerk. The juror Louis E. Wolcher is absent, your Honor.

The Court. Mr. Wolcher is unavoidably detained and it is now quarter past ten. Mr. Taylor, with your consent, and with the consent of the United States Attorney, may the case be tried by eleven jurors?

Mr. Taylor. Yes, your Honor.

Mr. Hammack. Yes, your Honor.

The Court. It will be so stipulated.

Mr. Hammack. The Government will so stipulate.

The Court. Mr. Wolcher is excused."

It is therefore urged that a waiver of a jury of twelve members under the circumstances of this case is in conflict with the opinion of this Court in the case of *Patton v. United States,* supra, as laid down in the last paragraph thereof, as follows:

> "The consent of government counsel and the sanction of the court must be had in addition to the *expressed and intelligent consent of the defendant.* And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable departures from the mode of a trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

7. Certiorari should be granted because of a conflict between circuits.

In the cases of *Frisby v. U. S.* (C. C. A. 4th, 1912) and *U. S. v. Hall* (C. C. A. Pa. 1809), each held that a law which deprives the person accused of a crime of a substantial right in which he was protected and granted immunity by the law in force at the time of the commission of the offense is *ex post facto.*

> *Frisby v. U. S.* (C. C. A. 4th, 1912), 38 App. D. C. 22, 37 L. R. A (N.S.) 96;
>
> *U. S. v. Hall* (C. C. A. Pa. 1809), 2 Wash. 366, 6 Cranch 171, 3 L. ed. 189.

In this case the contract of sale made by the petitioner to Evelyn Flynn was not unlawful on June 6, 1942 when it was executed.

In holding that such contract was a violation of Section 1388.1809, Maximum Rent Regulation No. 28, entitled "Evasion" in order to sustain petitioner's conviction the Court has made an *ex post facto* application of the Regulation in contravention of Article 1, Section 9, Clause 3 of the United States Constitution.

Conclusion.

The writ should be granted.

Dated, San Francisco, California,
July 3, 1944.

Respectfully submitted,

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(Appendix Follows.)